# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 190

LOWELL MICHAEL COIL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A 9–21) is reported at 343 F. 2d 573.

### JURISDICTION

The judgment of the court of appeals (Pet. App. B 22) was entered on April 5, 1965. On April 28, 1965, Mr. Justice White granted an extension of time to and including June 4, 1965 within which to file a petition for a writ of certiorari. The petition was filed on May 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



778-691—65

## QUESTIONS PRESENTED

1. Whether petitioner's conviction for maintaining a false morphine prescription file was unsupported by the evidence or was inconsistent with his acquittal on the companion charge of selling morphine without a prescription.

2. Whether it was error to permit a witness, who had testified that he had purchased morphine tablets from petitioner without a prescription, to invoke his privilege against self-incrimination when cross-examined concerning other unrelated narcotics transactions.

## STATEMENT

Petitioner, a pharmacist, was convicted, after trial by jury, of violating 18 U.S.C. 1001 by maintaining a prescription file at his pharmacy which falsely reflected the dispensing of 450 one-half grain morphine sulfate tablets to one Dorothy Williams between June 13 and September 26, 1963, when, in fact, no more than 120 of such tablets had been dispensed to that customer. He was acquitted on two counts charging, respectively, the maintenance of a false prescription file concerning the dispensing of demoral, and the sale without a prescription of morphine sulfate tablets to one William Michael Ruggiere.[1]

The evidence showed that prior to September 30, 1963, petitioner had ordered 600 half-grain morphine sulphate tablets (Tr. 6-7),[2] that on September 30, he had a physical inventory of 150 tablets on hand (Tr.

[1] Two additional counts were dismissed by the government prior to trial.

[2] "Tr." refers to the trial transcript.

10), and that his prescription file reflected the dispensing of 450 tablets to Mrs. Williams (Tr. 9). Because she was suffering from a painful and incurable disease, Mrs. Williams' physician had authorized petitioner to dispense the tablets to her as needed and then to send him the prescriptions for his signature (Tr. 38). Mrs. Williams' husband, testifying from records which he kept for tax purposes, stated that he had made eight or nine purchases from petitioner of twelve tablets each prior to September 30 and one purchase of thirty-six tablets on October 1 (Tr. 49–50).

When interviewed by a narcotics agent on September 30, petitioner said that he was short of morphine because it had been stolen from him by Ruggiere. He acknowledged that he was required by law to report the shortage and admitted that he had not done so. He said that he had tricked Mrs. Williams' doctor into unwittingly signing extra prescriptions (Tr. 27). Because his inventory balanced, he said, the agent could prove nothing (*ibid.*), and he further stated that since the agent could not prove what he had done to cover the shortage he would claim it was a lie if the agent ever made an issue of it (Tr. 31–32).

Ruggiere testified that he was addicted to morphine (Tr. 73) and that he had purchased half-grain tablets of the narcotic from petitioner without a prescription (Tr. 84) on several occasions for ten dollars a grain (Tr. 80–81). On cross-examination, he admitted that, if necessary, he would steal, cheat or lie in order to obtain morphine (Tr. 98–99). He further admitted that he had been arrested on Septem-

ber 30 by local police who had found a quantity of narcotics in the taxi in which he was riding (Tr. 105–107). He asserted his privilege against self-incrimination when asked if he had put the narcotics there, and the claim of privilege was sustained on the ground that State charges based upon that arrest were still pending against him (Tr. 108). He also asserted his privilege when asked whether certain other persons were narcotics users and whether he had taken a trip with them (Tr. 111), and that claim was also upheld since the trip was the subject of State charges pending against him (Tr. 116). Petitioner made an offer of proof that the narcotics found in the taxi were stolen from a pharmacy. This evidence, he contended, would prove that Ruggiere was not merely capable of being, but was in fact, a narcotics thief (Tr. 109–110). Petitioner also offered to prove that on the trip as to which Ruggiere asserted his privilege, he had feigned illness in order to obtain a narcotics prescription from a doctor. This evidence, petitioner contended, would demonstrate the extent to which the witness would go to obtain narcotics (Tr. 112). On this basis, petitioner claimed either that he should be given the right to interrogate the witness as to these trasactions, or that the witness' entire direct testimony should be stricken (Tr. 114–116). The requests were denied.

## ARGUMENT

1. There was adequate evidence (pp. 2–3, *supra*) to sustain a conviction of petitioner for maintaining a false prescription file with respect to morphine pur-

portedly dispensed to Mrs. Williams. Nor was his conviction on this count inconsistent with his acquittal on the charge of dispensing morphine to Ruggiere without a prescription. Maintaining a false file to conceal a shortage of narcotics is an independent offense, regardless of the cause which occasioned the shortage. Even had the jury believed that Ruggiere stole the morphine from petitioner, it could have convicted him of maintaining the false file. In any event, inconsistency in a jury verdict is not a ground for reversal. *Dunn* v. *United States*, 284 U.S. 390; *United States* v. *Dotterweich*, 320 U.S. 277, 279.

2. There is no merit to the claim that Ruggiere's cross-examination was improperly curtailed. The witness' direct testimony constituted an admission by Ruggiere that he had obtained narcotics from petitioner without a prescription, but it did not deprive him of his right to assert his privilege against self-incrimination with respect to other unrelated transactions not involving petitioner. See *Hoffman* v. *United States*, 341 U.S. 479; *McCarthy* v. *Arndstein*, 262 U.S. 355. Since cross-examination was sought upon matters collateral to the witness' direct testimony, permitting him to invoke the privilege did not require the court to strike his testimony. *United States* v. *Cardillo*, 316 F. 2d 606, 611 (C.A. 2), certiorari denied, 375 U.S. 822. In any event, Ruggiere's testimony was apparently discredited by the jury since it acquitted petitioner on the charge which turned upon his story.[3]

[3] Contrary to the assumption of the court of appeals (Pet. App. A 13), the defense of a theft of morphine by Ruggiere

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*
FRED M. VINSON, JR.,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
*Attorneys.*

JUNE 1965.

---

was not "apparently rejected as incredible by the jury." Rather, the jury had sufficient doubt concerning Ruggiere's credibility to acquit petitioner on the charge of selling narcotics to him without a prescription.

U.S. GOVERNMENT PRINTING OFFICE : 1965